ORIGINAL

RECEIVED
NOV 21 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-328

Supreme Court U.S.
FILED
NOV 21 1983
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1983

James Mabry, Commissioner,
Arkansas Department of Correction. . . . . Petitioner

V.

George Johnson . . . . . Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD QUIGGLE
904 West Second Street
P. O. Box 2651
Little Rock, AR 72203

Attorney for Respondent

10

REASONS FOR DENYING THE WRIT

1. Introduction

Petitioner urges the Court to grant a writ of certorari for two reasons. They are: (1) a supposed split between the circuits on whether detrimental reliance must be shown in the plea bargaining process (nominally no, said the Eighth and Fourth Circuits), or whether a defendant must have already entered his/her plea before any constitutional right attached (yes, said the Third Circuit); (2) whether the Eighth Circuit has decided an important constitutional question upon which this Court has not, but should, rule.

For a variety of reasons this supposed controversy does not merit review by this Court, as will be demonstrated below.

2. Factual Considerations

(A). The Split in the Circuits.

Petitioner's most appealing argument is that this Court should accept the case and decide a true division of opinion between the circuits.

If indeed petitioner was correct concerning the circuit split, this argument, based on the Court's historical willingness to hear such cases, would certainly be compelling. However, petitioner's claim of a split in the circuits is based on facile and uncritical reading of the cases in question.

The seminal opinion in connection with this dispute is Santobello v. New York, 404 U.S. 257 (1971), in which this Court held that the so-called "plea bargaining process" had constitutional dimension.[1] The federal district courts and the Courts

[1] Very significantly for purposes of this matter, Santobello strongly suggests that an unfavorable plea bargain can be enforced against a criminal defendant. Sauce for the goose can be sauce for the gander.

of Appeal have unformly adopted this decision. See, for example, U.S. v. Carter, 454 F.2d 426 (4th Cir. 1972) and Geisser v. U.S., 513 F.2d 862 (5th Cir. 1975).

Unquestionably, this Court in Santobello did not, and did not attempt to, resolve every factual situation in which relief was warranted because of the constitutional guarantees implicated in the plea bargain process. Of course, such a approach is logical, since not every possible factual situation can be anticipated.

Following Santobello, as in the cases cited by petitioner demonstrate, most plea bargaining cases have arisen after the plea has been entered. Santobello, however, does not hold that such niceities are required before the constitutional rights of a defendant are implicated.

Then comes the case of Cooper v. U.S., 594 F.2d 12 (4th Cir. 1979); the bone in the petitioner's throat here.

Cooper holds that in the right factual situation, the state can be held to its promises (bargain) even if the defendant has not detrimentally relied upon that promise. The opinion makes clear that the facts of each case are determinative.

A year later, the Third Circuit said that under the facts presented to it in Government of the Virgin Islands v. Scotland, 614 F.2d 360 (3rd Cir. 1980), it would not enforce a plea bargain under similar facts to those in Cooper.

The Third Circuit stated the facts in Cooper and Scotland were too similar to distinguish. With respect to the Third Circuit, it was wrong in this assessment. The facts were quite different.

In Cooper the state had made a clear and unequivocal offer for a plea bargain. This offer was accepted clearly and unequivocally. In Scotland, on the other hand, a crucial ingredient---testimony by the accused against his

co-defendants---was omitted from the bargain. When the government insisted he testify and the accused refused to do so, the agreement fell apart.

Thus, in Cooper there was full agreement. In Scotland there was not. This is a significant and determinative distinction.

Respondent's situation here is identical to that of the defendant in Cooper, and unlike that in Scotland.

The state here claims mistake in the original offer. Such a defense in a contract action among competent parties would be unavailing. Likewise, it should be here, particularly where constitutional principles are involved.

Given the divergent facts in Cooper, Scotland and here, it is obvious that the supposed split among the circuits is only a gloss. It does not exist.

Accordingly, the factual, usual and customary predicates for the possible grant of certiorari are missing---splits among the circuits in which the factual elements are identical.[2]

(B). Other Factual Considerations

As Santabello clearly indicates, each "plea bargaining" case must turn on its own facts. That was readily recognized by the Fourth Circuit in Cooper and the Eighth Circuit here.

There are other factual ingredients in this case, however, which make it rapidly distinguishable from Scotland, and even more compelling than Cooper.

First, respondent had already been convicted of other crimes arising out of the alleged accomplice murder from which the present case arises.

Second, there was strong evidence that respondent might not be convictable a second time on his murder charges: the finger-prints on the burglar's gun and on the window frame were entry

---

[2] Respondents understanding of this Court's mission is that of deciding legal not factual questions. Here, however, a careful factual analysis would have to be undertaken before any legal analysis could be attempted.

was gained were not Johnson's; the Arkansas Supreme Court had once reversed his conviction, and the key witness against him---Mr. Siscoe---was dead.

Finally, the district court (magistrate) had found that respondent's appointed trial counsel had rendered ineffectiveness assistance during the very time (or shortly thereafter) when the plea bargain agreement was breached.[3]

3. Other Reasons

For at least three other reasons, this is not an appropriate case for certiorari.

First, the disposition of the case is controlled by this Court's precedent in Santobello. That decision was obviously intended---and was so interpreted by the Court of Appeals here---as a signpost to the future and not as a signal back to the unfortunate maze of past "no rights" instances when the state could cavalierly and whimsically give and withdraw its promises at will, as here it seeks to do claiming "mistake".

Second, because of the unique facts involved in this case, and because additional appellate review would be necessary even if the Court were to ultimately rule in petitioner's favor, the potential question proposed by the petition should be left to await a case which more clearly presents the proposed issue.

Finally, the decision below is the correct one when all of the circumstances are considered.

The facts of the case are 13 years stale. The original trial occurred 12 years ago, and the conviction which resulted from that trial was reversed 11 years ago.

---

[3] The Court of Appeals specifically declined to reach the question of ineffectiveness in light of its holding that the plea bargain agreement had been breached. Thus, even if this Court determined this matter adversely to respondent, it would be necessary to remand the matter back to the Court of Appeals for consideration of this issue. Since the supposed split among the circuits is only superficial, and since no truly undecided federal question exists in light of Santobello, a remand of this case for a determination of proven ineffectiveness would be a total waste of the resources of the federal court system. Also a remand would only serve to further protract this matter, which has its genesis in 1970.

Subsequently---but still some 11 years ago---the state breached its plea bargaining arrangement with respondent.

Next, more than ten years ago, respondent pleaded guilty to a sentence twice as long as the original bargain contemplated. Moreover, this plea was made in the face of---now proven---ineffective assistance of counsel.[4]

Last, because of inherent delays, respondent has now served his enhanced sentence and is free on parole. Thus, his deserved victory in the Court of Appeals on one of his meritorious grounds is a paper victory if ever one existed---the state has already extracted from respondent a term of imprisonment based on the enhanced, but illegal, sentence.

4. Conclusion

For all of the reasons set out, this is not a proper case for plenary consideration by this Court. Certiorari should be denied.

Respectfully submitted,

RICHARD QUIGGLE
904 West Second Street
P.O.Box 2651
Little Rock, AR 72203

Attorney for Respondent

---

[4] Respondent's uncontradicted evidence showed that he felt at the time he was not receiving the kind of representation he deserved. Rather than go to trial with his lawyer totally unprepared and face a possible life sentence, he agreed to an additional 21-year sentence. Upon remand, the Court of Appeals would have to decide if the proven ineffectiveness was deserving of some remedy.

CERTIFICATE OF SERVICE

I, Richard Quiggle, hereby certify service by mail on this 16th day of November, 1983, to the following:

Mr. Dennis Molock
Assistant Attorney General
Justice Building
Little Rock, AR 72201

RICHARD QUIGGLE

RECEIVED
NOV 28 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MABRY, COMMISSIONER,
ARKANSAS DEPARTMENT OF CORRECTION — PETITIONER

Vs. NO. 83-328

GEORGE JOHNSON — RESPONDENT

DEC 9 PAGE 1

MOTION TO PROCEED IN FORMA PAUPERIS

1. The undersigned is the attorney for respondent.

2. This case was brought by respondent in the U.S. District Court for the Eastern District of Arkansas in forma pauperis. The undersigned was appointed to represent respondent (then petitioner), pursuant to 187 U.S.C. §3006(a).

3. After the district court ruled against respondent, he appealed to the Court of Appeals for the Eighth Circuit, which again appointed the undersigned (as counsel for appellant there).

4. The State of Arkansas has now petitioned for a writ of certiorari in this Court. Respondent requests that the appointment of the undersigned and his status as a pauper be recognized by this Court.

RICHARD QUIGGLE
Attorney for Respondent
904 West Second Street
P. O. Box 2651
Little Rock, AR 72203

CERTIFICATE OF SERVICE

I, Richard Quiggle, hereby certify service by mail on this 23rd day of November, 1983, to the following:

Mr. Dennis Molock
Assistant Attorney General
Justice Building
Little Rock, AR 72201

RICHARD QUIGGLE